(24)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 947

ARCHIE C. DAVIS,

Petitioner,

against

SHELL UNION OIL CORPORATION, ASIATIC PETROLEUM CORPORATION,

Defendants,

and

COMPANIA DE PETROLEO SHELL DE COLOMBIA; N. V. KONINKLIJKE NEDERLANDSCHE MAATSCHAPPIJ TOT EXPLOITATIE VAN PETROLEUMBRONNEN IN NEDERLANDSCHE-INDIE (ROYAL DUTCH COMPANY FOR THE WORKING OF PETROLEUM WELLS IN THE NETHERLANDS INDIES); THE SHELL TRANSPORT & TRADING COMPANY, LTD.; N. V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ (THE BATAVIAN PETROLEUM COMPANY); THE ANGLO-SAXON PETROLEUM COMPANY, LTD; and ASIATIC PETROLEUM COMPANY, LTD.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WM. DWIGHT WHITNEY,
Counsel for Respondents.

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The decisions below are unreported. The order of the Second Circuit Court of Appeals dismissing the appeal appears at R. 49, and the decision of said Court appears at R. 26. The opinion of the District Court appears at R. 34-49.

The petitioner invokes the jurisdiction of this Court under § 240-(a) of the Judicial Code (28 U. S. C. § 347).

STATEMENT OF THE CASE

The question is whether the complaint alleges joint liability on the part of the six defendants-respondents and of the two defendants who have answered and remain in the case.

The defendants-respondents are companies of Great Britain, The Netherlands, and the Republic of Colombia. The defendants which have answered are American corporations.

(a) The Complaint

No distinction is made in the complaint between the defendants. The theory of the complaint is that all eight constitute one so-called "Group"; that the whole Group acts together as one, with two members in control and the other six acting as "agents and instrumentalities". The District Court similarly construed plaintiff's complaint as charging joint liability (R. 35).

This idea is carried through the complaint with compelling persistence. At par. 11 (R. 6) the name of "Royal Dutch-Shell Group" is chosen by the pleader for all eight companies. At pars. 7 and 8 (R. 5) Royal Dutch (of The Netherlands) and Shell Transport (of Great Britain) are identified as the grand-parent corporations "who jointly own or control" the stock, assets and business of Batavian (of The Netherlands) and Anglo-Saxon and Asiatic *Ltd.* (both of Great Britain).[1] These three parent corporations are then alleged to have conducted their business in part through the two American corporations which remain in

[1]Emphasis ours throughout.

the case (Shell Union and Asiatic Petroleum *Corporation*) and in part through Shell Colombia (the Colombian corporation), as their "agents and instrumentalities", par. 9 (R. 5-6), whom they "dominate and control", par. 10 (R. 6). The "agent and instrumentality" conception recurs in pars. 12, 15, 19 and 21 (R. 6-8). At par. 13 (R. 6-7) we are told that it "is the practice of the Royal Dutch-Shell Group ***and each*** of the members thereof to transact business from their headquarters in London, England * * * and to negotiate and execute all contracts made in the State of New York * * * ***through the agency*** of an officer or director of Asiatic Petroleum Corporation or Shell Union, or a specifically authorized attorney in fact".

The main theme recurs in the detailed descriptions. The individual New York negotiators for the defendants are said to act "pursuant to authorization from the Royal Dutch-Shell *Group*", par. 17 (R. 7), and to represent that they are "authorized by the Royal Dutch-Shell *Group*", par. 18 (R. 7). Shell Colombia then executes the contract in suit, and performs the acts under it, "as the agent and instrumentality of the Royal Dutch-Shell Group", par. 21 (R. 8).

The plaintiff tells us that he himself made his demands "of *the defendants*", and that "the defendants, *including* Shell Colombia, failed and refused" to comply therewith, par. 25 (R. 8). Again, "the defendants" requested modifications of the agreement, and used "*their* authorized agents" to make representations to the plaintiff, par. 27 (R. 8-9). When modifying agreements came to be made, it was "*the defendants*" who "urged" and "agreed" to them, pars. 28, 30 (R. 9).

Finally, it is "by reason of the foregoing acts *of the defendants*" that the plaintiff has been damaged, par. 34 (R. 10).

In the second cause of action,—for alleged misrepresentation,—all of the allegations in pars. 1 to 29 are repeated, par. 35 (R. 10); and it is again "the defendants", acting through their aforesaid individual representatives, who made the alleged fraudulent representations.

(b) Summary

The petitioner has stated his position beyond equivocation.

He might have made his claim against either or both of the American corporations—Shell Union and/or Asiatic *Corporation*. Indeed, his case is now at issue with both of them.

He might alternatively have made his claim only against Shell Colombia,—which he alleges to have made the agreement in suit, relating as it does exclusively to lands in the Republic of Colombia[2],—oil leaseholds in the Department

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[2]We do not see why the Republic of Colombia is not the appropriate forum for the whole case. The question involves titles to lands in that Republic. The plaintiff, apparently an American speculator in Colombian property, sold options thereon to the Colombian corporation (Shell of Colombia), and apparently actually received from it $52,000 in cash, par. 33 (R. 10), and Exhibit "A" (R. 13). But apparently the titles did not satisfy the optionee, so that in the end the plaintiff had received, and Shell of Colombia had spent, upwards of $50,000, but the plaintiff still held the lands. Much is said of geological and geophysical examinations and explorations of the premises, par. 27 (R. 8-9) and pars. 36 and 37 (R. 10-11), as well as of the validity of title, par. 26 (R. 8). We submit that there would not be a gross miscarriage of justice if eventually it should prove necessary to try these issues in the Courts of the sister Republic in which both the plaintiff and defendants evidently had launched their enterprises.

of Magdalena, known as Torcoroma, Roman, Mosquitos and Monte Cristo, par. 14 (R. 7).

Or he might have elected to sue only the Royal Dutch and Shell Transport Companies, regarding them (as he evidently does) as the ultimately controlling grand-parents.

Or finally, he might have selected what he designates as the three intermediate parents,—The Batavian Company of The Netherlands and the Anglo-Saxon and Asiatic *Ltd.* companies of Great Britain.

In short, it was for him to decide what he considered his claim or controversy, and with whom. He has elected to make his claim a joint one, and the only question is as to the legal consequences which attach to that election.

ARGUMENT ON THE LAW

I

IT IS SETTLED LAW IN THIS COURT THAT THE DISMISSAL OF ONE OF SEVERAL PARTIES NAMED JOINTLY ON A SINGLE CLAIM OR CONTROVERSY DOES NOT CONSTITUTE A FINAL JUDGMENT.

(a) Authorities

The law was settled in *Hohorst* v. *Hamburg-American Packet Company,* 148 U. S. 262, a case not dissimilar to the present, in which a joint claim was made against a foreign corporation and its alleged agents in New York. The bill was dismissed as against the foreign corporation, but not as against the New Yorkers. The Court held that the appeal could not be maintained, because the decree in favor of the foreign corporation was not final.

This Court has had recent occasion to confirm the rule. *Reeves* v. *Beardall,* 316 U. S. 283. It was there explained that it is "differing occurrences or transactions, which form the basis of separate units of judicial action".

The quotation was taken by this Court from the concurring opinion of Circuit Judge Clark[3] in *Atwater* v. *North American Coal Corporation,* 111 F. (2d) 125, 126.

(b) Considerations of Policy

In the face of these authorities, we hardly think that comment from us can be of assistance. However, we may respectfully point out the practical common sense and judicial fairness of a rule which makes the distinction between

(i) Two different transactions or occurrences, giving rise to two different controversies or claims; and

(ii) Two defendants jointly alleged to have participated in precisely the same transaction or occurrence, giving rise to a single controversy or claim.

In the first type of case, a judgment on any of the claims or transactions is final as to that one, and leaves no more to be said in the Trial Court about it. An appeal is then appropriate.

In the other type of case, the Trial Court still has the single occurrence or transaction *sub judice;* and the policy of the Judicial Code against appeals "in fragments" becomes applicable.

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[3]Our case was decided by a bench consisting of Judges Swan, Chase *and Clark.*

The petitioner urges upon this Court that the doctrine, so firmly established and so recently repeated, should nonetheless be reviewed and overruled. But we respectfully submit that no considerations of public policy, of the character that sometimes warrant the overruling of previously established interpretations of procedural statutes, could possibly find their appropriate application in a case where the sole effect is to require a plaintiff, who has elected to sue two or more corporations (some domestic and some foreign) on the assumption that they jointly committed precisely the same act, to accept until the proper time for appeal a judgment of the District Court that there is no jurisdiction over the foreign corporations.

II

THERE IS NO CONFLICT OF CIRCUITS

The petitioner asks this Court to find a conflict in the decision of the Eighth Circuit Court of Appeals in *Thompson* v. *Murphy,* 93 F. (2d) 38. But the Court there obviously held that the defendants were not named as jointly liable. See, for example, the quotations which appear in the first column of 93 F. (2d) 40, and which are repeated in the following language of the Court in the second column on the same page, from *Standley* v. *Roberts,* 59 Fed. 836, 839:

> "* * * the order is reviewable under the rule of this court as 'a final decision which completely determines the rights in the suit * * * of some of the parties *who are not claimed to be jointly liable* with those against whom the suit is retained'."

The petitioner adds: "See also, *Moss* v. *Kansas City Life Ins. Co.*, 96 F. (2d) 108 (C. C. A. 8th, 1938)". The *Moss* case in fact provides further evidence that the Eighth Circuit Court of Appeals both understands the rule and understands it in the same way as the Second and other Circuit Courts of Appeals,[4] and is directly in point in our favor. There the plaintiff dropped all but three defendants from the case. The latter filed separate motions to quash. The motions of two of the defendants were sustained prior to that of the third. After the motion of the third defendant was sustained an order was entered dismissing the cause as to all three and an appeal was allowed from such order. A motion was made to dismiss the appeal of the first two defendants as out of time because their motions to quash were sustained more than three months before the allowance of the appeal. The Court held that the appeal was timely, as they were jointly liable with the third defendant, and therefore that their dismissal from the case did not constitute a final appealable judgment and that there could be no such judgment until the case was dismissed as to the third defendant. The opinion reviews the decisions in the *Hohorst* and related cases, and contains an authoritative interpretation by the Eighth Circuit Court of Appeals itself of the case relied upon by the petitioner here, *Thompson* v. *Murphy*, 93 F. (2d) 38, *supra*.

Respectfully submitted,

WM. DWIGHT WHITNEY,
Counsel for Respondents,
15 Broad Street,
New York City.

May 19, 1944.

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[4] *Fields* v. *Mutual Ben. Life Ins. Co.*, 93 F. (2d) 559 (4 Cir.); *Hunteman* v. *New Orleans Public Service, Inc.*, 119 F. (2d) 465 (5 Cir.).